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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 722

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

SALVATORE ARNONE AND ANTONIO PINTO,

Petitioners.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

Petitioners seek review of a judgment of the Appellate Division, Second Department, of the Supreme Court of the State of New York, rendered on April 18, 1966 (25 A D 2d 820), which affirmed a judgment of the Supreme Court of the State of New York, convicting petitioners, on their pleas of guilty, of an attempt to operate a policy business (section 974b of the New York Penal Law).

Prior to the entry of their guilty pleas, petitioners moved to controvert a search warrant and to suppress the evidence which formed the basis for the prosecution. A hearing was held before Justice Joseph M. Conroy of the Supreme Court of the State of New York on April 16, 1963.

Justice Conroy denied the motion in an opinion and order dated April 29, 1963.*

Pursuant to Section 813-c of the New York Code of Criminal Procedure, the appeal to the Appellate Division brought up for review the denial of the motion to controvert the warrant and suppress the evidence notwithstanding the pleas of guilty. After the Appellate Division affirmed the order of the court below, petitioners sought and were denied leave to appeal to the New York Court of Appeals by the Hon. Adrian P. Burke, Associate Judge, on July 1, 1966.

Clarification Of The Issues Presented By The Petition

The sole issue presented by the petition herein is whether a search warrant which described the premises to be searched as one ". . . believed to be occupied by Frances Arnone [at] . . . premises 40-66 97th Street, Corona, Queens, first floor rear apartment . . .", authorized the search of a basement apartment within the named premises; and, if so, whether such authorization and the search pursuant thereto meet the Fourth Amendment's requirement that no warrant shall issue without "particularly describing the place to be searched."

Petitioners contend that because the warrant described Arnone's apartment as a first floor rear apartment rather than a basement apartment, it could not lawfully authorize a search of the latter. This, notwithstanding the fact that the officer upon whose affidavit the warrant issued could not have discovered, without a trespass, that the outer door

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* Respondent's Appendix A.

of the apartment searched did not open into that apartment but opened upon a flight of stairs leading to that apartment below.

The Hearing On The Motion To Controvert The Warrant And Suppress the Evidence

At the suppression hearing, Detective John Macauley testified that on October 23, 1962, he placed a wager with an unidentified male. Accepting the slip of paper that Macauley gave him, the unknown male placed it in a brown paper bag and walked away. Several minutes later, after being approached by numerous other persons, the unknown male met petitioner Pinto several blocks from the original transaction (R. 45, 46).

Pinto took the brown paper bag, entered a car and drove to premises 40-66 97th Street, Corona, Queens. He entered the building, a four family house (R. 47, 48). On October 25, 1966, Macauley observed Pinto enter " . . . the apartment of the rear of the first floor" (R. 48). "I observed him enter a door on the left hand side of the ground floor, which eventually, the date of arrest, I found led into the basement" (R. 49).

After making these observations, Macauley obtained a search warrant* issued out of the Criminal Court of the City of New York on October 26, 1962, authorizing the search of "40-66 97th Street, 1st floor rear apartment, Corona, Queens, occupied by Francis Arnone" (R. 60).**

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* Respondent's Appendix B.

** The affidavit upon which the court issued the warrant is reproduced as Respondent's Appendix C.

Pursuant to the search warrant, Macauley entered premises 40-66 97th Street, knocked on the door leading to the basement apartment (the same door he had seen Pinto enter previously) and announced that he was a police officer. There was no answer. However, he heard a "scuffling and noise downstairs," whereupon he announced that he had a search warrant. Receiving no response, he opened the door, walked down the stairs leading into the basement apartment, entered the apartment and executed the warrant (R. 53).

The motion to suppress the evidence was denied.

POINT ONE

The description of the premises was well within the standards of particularity mandated by the Fourth Amendment.

The Fourth Amendment provides in pertinent part that " . . . no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized".

In *Steele* v. *United States,* 267 U.S. 498 (1925) this court formulated the standards to be applied in resolving the issue of "specificity" under the Fourth Amendment as follows:

> "It is enough if the description is such that the officer with a search warrant can with reasonable effort, ascertain and identify the place intended." (267 U.S. at p. 503)

The first question presented by the instant petition, therefore, is whether the warrant herein conformed to the standards of specificity set forth above. We think that a fair analysis of the record compels the conclusion that the searched premises were described with as much particularity as the circumstances permitted, and that the description was more than adequate in insuring against a general search—the fundamental value underlying the specificity requirement.

To begin with officer McCauley observed petitioner Pinto enter the door at the rear of the first floor of the named premises. Had he followed Pinto through the door for the purpose of searching or gathering additional evidence, petitioners would have certainly contended that the officer was a trespasser and that his observations should have been suppressed as such. That he did not enter but instead left the premises to secure a search warrant is, we think, praiseworthy. His actions hardly warrant the characterizations of "recklessness" and "illegal behavior" which petitioners attribute to them (Petition at p. 11).

Petitioners argue, however, that after securing the warrant, knocking on the door, announcing his identity and purpose and hearing a "scuffling and noise" McCauley should have left the building, returned to the magistrate and obtained another search warrant. Such a suggestion is we submit patently absurd. Can there be any doubt that had he left the premises, petitioners would have disposed of the contraband before his return? To require such a futile act from a police officer who has done everything in his power to comply with the law is to distort the Fourth Amendment into an unworkable shibboleth. Thus, under

the circumstances, McCauley could not have reasonably been expected to offer to the magistrate a more complete description than that given. We think the description was entirely adequate:

It described the premises by address; it labelled the apartment to be searched as the first floor rear; and it gave as the name of the suspected occupant, one, Frances Arnone. True, the apartment was in fact occupied by Salvatore Arnone and we do not know whether petitioner was known by another name, a not unlikely possibility. However, we think it fair to say that such an error did not detract from the warrant's specificity. Rather, it limited the apartment to be searched even further.

We are left then with the fortuitous circumstance that the door at the "first" floor rear led into an apartment below. There is no suggestion that an intervening apartment was discovered between the door and the "basement" apartment. And it is clear from this record that McCauley wanted only to search the apartment located behind the door. That he thought it was directly behind the door and, therefore, called it a first floor apartment is again a fortuitous circumstance. The "place intended" was the apartment located behind the door. Measured against the guidelines set down in *Steele* the ability "with reasonable effort [to] ascertain and identify the place intended"—the description was well within the Fourth Amendment's requirement of specificity.

POINT TWO

The standards governing the specificity of search warrants as set forth in *Steele* v. *United States*, 267 U.S. 498, are adequate to insure against the issuance of general warrants.

At the outset, we must confess to some difficulty in understanding the precise nature of petitioners' argument. Petitioners suggest either that the standards set forth in *Steele* are inadequate to the task of safeguarding against general searches, or that there has been a widespread disregard of those standards by the lower courts.

In either case we must look to the application of those standards to determine whether petitioners' contentions have merit. We hope to demonstrate in the following pages that they do not.

In *People* v. *Rainey*, (4 N Y 2d 35) the New York Court of Appeals declared the invalidity of a search under a warrant describing the premises as "529 Monroe Street in the City of Buffalo." The premises involved consisted of a two family house, and probable cause existed with respect to only one of the dwelling units. Judge Dye, writing for the majority, ruled that

> ". . . the validity of the search warrant depends on whether the showing, at the time of issuance, satisfies fundamental requirements as to the existence of probable cause and whether description of the premises to be searched and the person or things to be seized satisfy basic requirements. The paramount concern, then, is what transpires at the issuance of the warrant and not what occurs thereafter."

Recognizing the fundamental values underlying the constitutional imperative that a search warrant particularize the place to be searched, he observed:

> "It is to avoid 'a blanket search' with its obvious interference with the innocent that the State and Federal Constitutions provide that 'No warrants shall issue, but upon probable cause, * * * and particularly describing the place to be searched, and the persons or things to be seized' (N.Y. Const., art. I sec. 12; U.S. Const., 4th Amdt.).
>
> The Federal courts have consistently held that in the absence of circumstances sufficient to satisfy fundamental requirements a search warrant so issued is void. The purpose of the requirement for particularity of description of the place and the person and things to be seized is to provide adequate means of identification which is not met by a generality commanding the search of an entire residential building when, as matter of fact, probable cause exists for the search of but a single residential space located therein (*United States* v. *Hinton*, 219 F. 2d 324 [C.A. 7th, 1955]; United States v. Barkouskas, 38 F. 2d 837 [U.S. Dist. Ct., M.D. Pa., 1930])."

In *McGinnis* v. *United States*, 227 F. 2d 598 (1st Cir. 1955), the court relying upon *Steele*, struck down the search of defendant's barn under a warrant describing the premises as "said barn of said John Doe in Canterbury." The court ruled that "[t]he description . . . is certainly not such as could be said to enable the officer with reasonable effort to ascertain and identify the farm. We have no hesitancy in holding that the state search warrant is invalid."

In *United States* v. *Hinton*, 219 F. 2d 324 (7th Cir., 1955) the court overturned the convictions of the two narcotics sellers on the sole ground that the evidence which formed the basis for the prosecution had been seized pursuant to a search warrant which was not specific enough to meet Fourth Amendment requirements. The warrant had been issued upon an affidavit describing narcotics sales at premises 6423 Champlain Avenue in the City of Chicago. Since the named premises was a three story building the court held the descripiton was too broad, and that, therefore, the search pursuant thereto, was illegal.

Similar cases in every Circuit and in the state courts made it unmistakably clear that the *Steele* standards are adequate to protect against, and have been applied with, a deep sensitivity to the perils of the general warrant. See, *e.g.*, *United States* v. *Barkouskas*, 38 F. 2d 837 (D.C. Pa. 1930); *United States* v. *Thomas*, 216 F. Supp. 942 (N.D. Cal., 1963); *United States* v. *Joseph*, 174 F. Supp. 539 (E.D. Penn. 1953) aff'd 278 F. 2d 504 (3rd Cir.), cert. denied, 364 U.S. 823; *United States* v. *Contee*, 170 F. Supp. 26 (D.C. D.C. 1959); *People* v. *Estrada*, 234 C.A. 2d 36, 44 Cal. Rep. 165; *Ferguson* v. *State*, 236 Md. 148, 202 A 2d 758; *State* v. *Daniels*, 46 N.J. 428, 217 A 2d 610.

On the other hand, the courts have experienced little difficulty in applying *Steele* in sustaining the validity of search warrants whose descriptions are challenged on account of vagueness.

In *United States* v. *Falcone*, 109 F. 2d 579 (2nd Cir. 1940, aff'd 311 U.S. 265), Judge Learned Hand, in rejecting appellant's claim that the search warrant involved in that case was not specific enough, wrote:

> "A warrant must indeed be specific enough not to allow the officers latitude to search at their choice; [but] . . . all that is required is reasonable certainty of identification" (citing *Steele et al.*).

See also *Kenny* v. *United States*, 157 F. 2d 442 (C.A. D.C. 1946); *United States* v. *Klaia*, 127 F. 2d 529 (2nd Cir. 1942); *Fine* v. *United States*, 207 F. 2d 324 (6th Cir. 1954).

The guidelines set forth by this court over forty years ago have been uniformly adhered to by trial and appellate courts throughout the country. They carry with them not only the authority of time but a common sense as well. Petitioners would read the rule of reason out of the Fourth Amendment and replace it with a hyper-technical ritualistic formula.

This court has only recently rejected a similar effort when it stated:

> "These decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common sense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." *United States* v. *Ventresca*, 380 U.S. 102 (1965).

The arguments advanced in the petition herein reflect a retreat from the sound and consistent position taken by this court in elevating search warrants to a preferred position under the Fourth Amendment.

Petitioners have made no showing for the taking of such a backward step.

CONCLUSION

The petition for the writ of certiorari should be denied.

Respectfully submitted,

NAT H. HENTEL
District Attorney
Queens County

NEIL FABRICANT
Assistant District Attorney
of Counsel

December, 1966.

APPENDIX A

Opinion of Conroy, *J.*, Denying Motion to Suppress

SUPREME COURT

QUEENS COUNTY

CRIMINAL TERM—PART I

Ind. No. 1773—62

THE PEOPLE OF THE STATE OF NEW YORK,

v.

SALVATORE ARNONE,
ANTONIO PINTO,

Defendants.

By JOSEPH M. CONROY, *J.*

Dated April 29th, 1963

A hearing was held on April 16, 1963 (1) for an order to vacate a search warrant issued October 26, 1962, and the return of the property seized, and (2) to suppress the use of such property seized as evidence on the ground that said seizure was unreasonable and in violation of the IV Amendment of the United States Constitution.

Based upon the testimony and affidavit for the search warrant (Ex. A), the Court finds there was probable cause for the issuance of said warrant and that branch of the motion is denied.

The remaining issue is the legality of the search and seizure based upon the search warrant. The warrant di-

rected a search of premises 40-66 97th Street, 1st Floor rear apartment, Corona, Queens, occupied by Frances Arnone and others. The testimony at the hearing was that the entrance to the apartment in question was on the rear of the first floor of premises 40-66 97th Street, Corona, and that upon opening the door there was a flight of steps leading down to a basement apartment. In the basement apartment the detectives found both of the defendants together with written records of Mutuel Race Horse Policy and other gambling paraphernalia.

The petitioners argue that the basement of said premises is a separate and distinct area and cannot be said to form a part of or to be in any way related to the premises designated in the warrant to be searched, citing *U. S.* v. *Falcone,* 109 Fed. (2d) 579, 582; affd. 311 U. S. 205. A reading of that case does not strengthen the petitioners' position. It does state "A warrant must indeed be specific enough not to allow the officers latitude to search at their choice;" however it then goes on to state "All that is required is reasonable certainty of identification," citing *Steele* v. *U. S.,* 267 U. S. 498, 503, 45 S. Ct. 414, 69 L. Ed. 757; *Chiaravalloti* v. *U. S.,* 7 Cir., 60 F. (2) 192; *Rose* v. *U. S.,* 8 Cir., 45 F. (2) 459.

There is no dispute that the *entrance* to the apartment was in the rear of the first floor of the premises. In addition, the two petitioners were co-lessees of the apartment whose entrance was in the rear of the first floor (see affidavit of Antonio Pinto, dated April 2, 1963, p. 1).

In *U. S.* v. *Barkouskas* (38 F. (2) 837, 838) the Court stated "(I)t has been held that a search warrant is valid which directs the search of an apartment house or other

buildings occupied by a number of different tenants, and states the name of the person occupying the apartment to be searched. Such a description is sufficient, as it 'particularly' points to a definite ascertainable place". In *U. S.* v. *Wihinier* (284 F. 528) it held that a search warrant was valid which gave the street number and city, the name of the person who was the occupant. In that case the premises was an apartment house.

In *Townsend* v. *U. S.* (258 F. (2d) 461), the Court stated "The warrant of search was directed solely to the premises and not to a person. The address specified was the correct address and street number of Townsend's residence. The warrant accurately identified and described it. The description was such as to enable the officer readily to find it. That is sufficient."

The test of the sufficiency of the description is whether it enables the officer executing the warrant to locate the place definitely and with certainty (74 A. L. R. 1418, 1500).

The motion is denied.

Order entered accordingly.

The clerk of the Court is directed to mail a copy of the decision and order to the attorney for the defendants.

JOSEPH M. CONROY,
J. S. C.

APPENDIX B

Search Warrant

CRIMINAL COURT OF THE CITY OF NEW YORK

PART 8A, COUNTY OF MANHATTAN

In the name of the People of the State of New York:

To any peace officer in the City of New York.

Proof by affidavit (or deposition) having been made this day before me by Detective John C. Macauley, Shield 544 and assigned to the Police Commissioner's Confidential Investigating Unit, that there is probable cause for believing that certain property consisting of written records of Mutuel Race Horse Policy bets, slips, pads, pencils and other illegal gambling paraphernalia commonly used in the violations of sections 974 and 975 of the Penal Law of the State of New York and said property may be found on the person of the following described person'(s): Subject 2: male, white, approximately 30 to 35 years of age, 160 lbs., slightly bald. Or in the premises of 4066 97th Street, apartment 1st floor rear, Corona, Queens.

You are therefore commanded, in the daytime to make an immediate search of 4066 97th Street, 1st floor rear apartment, Corona, Queens occupied by Frances Arnone, subject described above and others and of the person of the above described person'(s) and of any other person who may be found to have such property in his possession or under his control or to whom such property may have been delivered, for written records of Mutuel Race Horse Policy and other illegal gambling paraphernalia commonly used in violation of Sections 974 and 975 of the New York

Appendix B—Search Warrant

State Penal Law and if you find any such property or any part thereof to bring it before me at Part 8A at 100 Centre St., New York City.

Dated at New York City,
October 26, 1962.

Judge.

1 P. M.

APPENDIX C

Affidavit for Search Warrant Sec. 797-a C. C. P.

CRIMINAL COURT OF THE CITY OF NEW YORK

PART 8A, COUNTY OF MANHATTAN.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JOHN C. MACAULEY being duly sworn, deposes and says:

1. I am a Detective, shield number 554, Police Commissioner's Confidential Investigating Unit.

2. Information based on a previous investigation which resulted in an arrest; deponent at approximately 12 Noon on October 23, 1962, did station himself in the vicinity of 94th Street and 2nd Avenue, Manhattan, and did observe an unknown male, white, about 40 years of age, approximately 5'9", medium build, being approached by numerous unknown males and females and engage each in a conversation, some of whom did hand him slips of paper and money which subject male did accept and did place said slips of paper in a brown paper bag which he carried on his person. At about 1:15 P. M. deponent approached subject male and did place a policy bet with him, which he accepted and did place in same brown paper bag. Deponent kept subject male under observation and did observe other males and females engage him in conversation and hand him money and pieces of paper and also at times subject male did make notations on a piece of paper all of which he placed in the

Appendix C
Affidavit for Search Warrant Sec. 797-a C. C. P.

aforementioned brown paper bag. At about 2:10 P. M. subject male did proceed to 92nd Street and York Avenue, Manhattan, where he met a male, white, 30 to 35 years of age, approximately 160 lbs., slightly bald, wearing a green cloth jacket, who emerged from a 1959 Oldsmobile, blue, two door sedan, bearing registration 5C4674 (NY) listed in the files of the Motor Vehicle Bureau to Lorraine Pinto, 321 East 116th Street, Manhattan and engage in a short conversation. Subject male did hand to subject male #2 the same aforementioned brown paper bag which he accepted. Subject male #2 reentered vehicle described above and proceed to premises 40-66 97th Street, Corona, Queens. On October 24th and 25th the same set of circumstances did occur at about the same times as above and under the same circumstances. On October 25, 1962 subject male #2 described above, operator of aforementioned vehicle, was seen to enter first floor rear apartment of premises 40-66 97th Street, Corona, Queens. This apartment believed to be occupied by Frances Arnone.

3. Based upon the foregoing investigation and upon my personal knowledge there is probable cause to believe such property consisting of written records of Mutuel Race Horse Policy in violation of Sections 974A, 974 and 975 of the Penal Law of the State of New York and other illegal gambling paraphernalia and may be found in the possession of above described person at premises 40-66 97th Street, Corona, Queens, first floor rear apartment and others found therein in violation of 974 and 975 of the Penal Law.

Appendix C

Affidavit for Search Warrant Sec. 797-a C. C. P.

WHEREFORE, I respectfully request that the court issue a warrant and order of seizure, in the form annexed, authorizing the search of above described person and premises and directing that if such property or evidence or any part thereof be found that it be seized and brought before the court; together with such other and further relief that the court may deem proper.

No previous application in this matter has been made in this or any other court or to any other judge, justice or magistrate.

Police Officer Sh. Rank Command

Sworn to before me
October 26, 1962

Judge